Supreme Court, U.S.
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No. 98-1005

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

ANGELO RODRIGUEZ,

Petitioner,

v.

THE CITY OF CHICAGO,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the City of Chicago reasonably accommodated the religious beliefs of a police officer who objected to assignments that required him to provide protective services at abortion clinics when its collective bargaining agreement with the officer's union entitled the officer to change his assignment or shift so that he would not have to perform the duties to which he had religious objections.

2. Whether the City of Chicago can be held liable for failing to accommodate the religious objection of a police officer to assignments that required him to provide protective services at abortion clinics even if a collective bargaining agreement offered that officer a reasonable accommodation of which the officer was aware, merely because the City failed to remind the officer of his right to avail himself of the applicable provisions of the collective bargaining agreement when the officer requested that he be exempted from such assignments.

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STATEMENT

At all times relevant to this lawsuit, petitioner Angelo Rodriguez was employed by the Chicago Police Department as a patrol officer assigned to the second watch in the 14th District. R. 52, ¶ 3.[1] There are two medical clinics within the 14th District that provide medical services to women seeking abortions. *Id.* ¶ 13. The clinics are located in the beat adjacent to the one to which petitioner was routinely assigned. R. 45, ¶ 19.[2] Since at least September 1991, the Police Department has from time to time assigned officers to the clinics because of the risk of violence and potential interference with a lawful business. R. 52, ¶¶ 12, 27. The purpose of the clinic assignments is to enforce the law and protect individuals and property. *Id.* ¶ 23.

Assignments to the clinics were made fairly regularly after an October 23, 1993 demonstration at one of the district's clinics, although they were less frequent during the winter. R. 52, ¶ 22. They were stepped up again in approximately August 1994 in response to violence at a clinic in Pensacola, Florida, and a request from demonstrators on both sides of the abortion issue. *Id.* ¶¶ 23-25. Since approximately November 1994, abortion clinic assignments have been infrequent because of the lack of demonstrators. *Id.* ¶ 29. Assignments are made

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[1] The Chicago Police Department has three watches. R. 52, ¶ 14.

[2] Under the Chicago Alternative Policing Strategy ("CAPS"), which became fully effective in January 1995, ordinarily only officers assigned to the beats in which abortion clinics are located, and officers from nearby beats, are assigned to clinic duty. R. 52, ¶¶ 53, 58-60.

only in special circumstances or if a clinic calls for assistance. *Id.* ¶ 30.

As petitioner testified, clinic assignments are pretty much exclusively made on Saturdays and are "always," in his experience, over by noon. R. 52 at Exh. J at 92. Like other assignments, clinic duty was assigned either at the station by the watch commander during roll call or by radio dispatch to an officer in the field. R. 52, ¶ 21. In general, the detail would run from 7:30 a.m. until noon, with each officer performing a 2.5 hour shift. *Id.* ¶ 20, 26. The detail was broken up this way because officers considered it a boring assignment. *Id.* ¶¶ 19, 20.

During most of the time relevant to this lawsuit, an officer on the first watch, 11:00 p.m. until 7:00 a.m., was sent to the clinic at approximately 5:00 or 6:00 a.m. to monitor for protestors. R. 52, ¶ 14. An officer from the second watch, 7:00 a.m. until 3:00 p.m., would relieve the first watch operator. *Id.* If no protestors were present, the assignment was cancelled at approximately 9:00 a.m. or 9:30 a.m. *Id.* ¶ 15. If one or more protestors were present, one police officer was assigned to the clinic to make the police presence prominent and to keep the peace. *Id.* ¶¶ 15, 16; *id.* at Exh. K at 11-12. More officers were sent if a group of protestors appeared. R. 52, ¶ 17. Clinic coverage varied from month to month and season to season, with demonstrations being less frequent in the winter. *Id.* ¶¶ 18, 22; R. 52 at Exh. J at 118.

Petitioner has been assigned a total of three times to duty at the clinics, and on one of those occasions he volunteered. R. 52, ¶¶ 31-34. In January 1994, after the

first two assignments, petitioner told his watch commander, Captain William Guswiler, that he did not want to be assigned to the clinics except in emergencies because such duty conflicted with his Roman Catholic beliefs. *Id.* ¶¶ 4, 35. Capt. Guswiler told petitioner that he could not exempt him from any assignment but that he would try not to assign him to the clinics. *Id.* ¶ 35.

From April to September 1994, petitioner was on medical leave. R. 52, ¶¶ 9, 22, 36-37. After petitioner's return from leave, on October 7, 1994, he submitted a memorandum to Capt. Guswiler formally seeking an exemption from clinic duty due to his Roman Catholic beliefs. R. 52, ¶ 38. Petitioner submitted the memo because he knew that Capt. Guswiler was not going to be able to honor their arrangement permanently. R. 45, ¶ 76. Guswiler forwarded the memorandum to 14th District Commander Jose Velez. R. 52, ¶¶ 4, 38. The next day, Cmdr. Velez spoke with Capt. Guswiler about petitioner's request. *Id.* ¶ 40. The two agreed that petitioner could not refuse an assignment, but, depending upon operational need, Capt. Guswiler could try to avoid assigning petitioner to the clinic. *Id.* at Exh. K at 58; R. 45, ¶ 100. Cmdr. Velez never responded to petitioner directly, nor did he inform any one else of petitioner's request, because Department policy is clear that an officer cannot refuse an assignment. R. 52, ¶ 41-42.

On November 19, 1994, Capt. Guswiler decided to assign police personnel to one of the clinics because demonstrators were present. R. 52, ¶ 44. At approximately 11:35 a.m., the officer on duty at the clinic requested replacement. *Id.* ¶ 46. Officers can request a

replacement for various reasons, such as to use the bathroom. *Id.* Petitioner was assigned by dispatch to the clinic. *Id.* Before going to the clinic, petitioner returned to the station house and asked his immediate supervisor, Sgt. Ronald Grimes, to be exempted from clinic duty. *Id.* ¶ 47. Sgt. Grimes denied the request. *Id.* Petitioner then spent approximately one-half hour outside the clinic. *Id.* ¶ 46.

According to petitioner, he is willing to respond to emergencies at the clinics but is unwilling to perform any duty there when the situation is peaceful. R. 52, ¶¶ 48-49. At his deposition, petitioner could not define what would constitute an "emergency" to which he would be willing to respond. *Id.* ¶ 50; *id.* at Exh. J at 127-51, 173-96. At one point he defined emergencies as "Priority One" assignments, but the Police Department already considers clinic assignments to be "Priority One." R. 52, ¶¶ 51-52, 56. Petitioner also maintains that he must be permitted to decide upon arrival at the clinic whether his assignment is actually an emergency. *Id.* ¶ 57. As a result, he does not believe he should have to take assignments for civil disturbances or even "mass civil disorder" at a clinic. *Id.* at Exh. J at 127-29.

The record reflects the logistical difficulties police dispatching would face if they were required to honor a patrol officer's request to be exempted from particular assignments. In winter months, the Communications Section, which is in charge of dispatching assignments to officers in the field, receives an average of 9,000-10,000 calls a day. R. 52, ¶ 63. During the spring, summer, and early fall, volume increases to an average of 14,000-15,000 calls a day. *Id.* Radio on-air time is kept

to a minimum because of the high call volume. *Id.* ¶ 73. In fact, air time "is very valuable. Air time is a police safety issue and it's a public safety issue and it's a police efficiency issue." R. 60 at Exh. C at 105. Dispatchers use several computer screens showing all pending events to which they need to assign officers and all events that have been assigned. R. 52, ¶ 66. The computer might show only the address of the incident, not what type of business is located at the address. *Id.* ¶ 70. Dispatch knows only the beat car number and whether it is a one- or two-person car. *Id.* ¶ 67. Dispatch does not know the identity of the officers in the cars, nor does it have the capacity to code a beat car for some special designation. *Id.* ¶¶ 67-68, 70. Not infrequently, in the 14th District there will be only one car (or no cars) available to accept assignments at particular times. *Id.* ¶ 61. A shortage of available cars, may create a problem in providing police services. *Id.* ¶ 62; R. 54, ¶ 62.

Dispatchers operate on the assumption that any on-duty officer not on assignment is available for assignment. R. 60, ¶ 178. Officers cannot refuse an assignment from dispatch except in limited circumstances. R. 52, ¶ 54. The decision of the dispatcher is considered final, unless altered by the field lieutenant or supervising sergeant. *Id.* ¶ 55. Consequently, if an officer informed the dispatcher that he could not handle a particular assignment because of his religious beliefs, the dispatcher would have to contact the officer's supervisor to verify the exemption. *Id.* ¶¶ 74, 76, 78. This, in turn, would disrupt and delay service and tie up the air waves with three-way negotiations among the officer, the officer's supervisor, and dispatch. *Id.* ¶¶ 75, 77; see

also *id.* at Exh. I (testimony of Commander of Communications Jerry Robinson).

At all relevant times, petitioner was covered by a collective bargaining agreement ("CBA") between the City and the Fraternal Order of Police Local Lodge No. 7. R. 52, ¶ 6. Under section 23-8 of the CBA, officers may bid to transfer between districts. *Id.* ¶ 83. Bids are granted based upon seniority. *Id.* Petitioner was aware of his right to bid and knows that vacancies are posted in the roll call room. *Id.* ¶ 88. Petitioner's pay and benefits would not be affected by a transfer. *Id.* ¶ 89.

There were several districts closer to petitioner's home than the 14th District that do not have within them any facilities at which abortions are performed; these other districts are considered comparable to or more desirable districts than the 14th. R. 52, ¶¶ 84-86. Petitioner had enough seniority to bid to six different comparable or more desirable districts and obtain (except perhaps in one of the districts) the same shift he currently works. R. 52, ¶ 87.

Petitioner also had other options available to him under the CBA that would enable him to avoid assignments at abortion clinics and yet stay in the 14th District. He admitted that he had enough seniority to work on the third watch, which begins at 3:00 or 4:00 p.m., after clinic assignments have ended. R. 52, ¶ 91; *id.* at Exh. J at 73. The Department also has special function assignments that do not involve patrol work. R. 54, ¶ 92. Alternatively, petitioner could remain in the 14th District even on the second watch, because with his seniority, petitioner could also use a combination of vacation days, "baby furlough" days, personal days, and

his compensatory time to avoid working every Saturday in the course of the year. R. 52, ¶¶ 93-95; see also R. 52 at Exh. L at 39-40; R. 54, ¶ 93-95.[3] Petitioner does not have to give any reason for requesting time off, and has, within the last few years, never been denied a request to use his compensatory time or to take a day off. R. 52, ¶¶ 95-96; *id.* at Exh. J at 252. Petitioner believes that he has enough seniority to utilize his benefit days whenever he likes. R. 52, ¶ 96. He also has the option of taking time off without pay. *Id.* ¶ 97; R. 54, ¶ 97.

On September 20, 1995, petitioner filed a four-count complaint against the City of Chicago alleging that the City had discriminated against him on the basis of his religion by refusing to exempt him from assignments requiring him to maintain the peace outside of abortion clinics. R. 1. In count I, he alleged religious discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991, 42 U.S.C. § 2000e-2. R. 1 at 13-14. Count II alleged religious discrimination in violation of the Municipal Code of the City of Chicago. *Id.* at 14-15. Count III alleged a violation of his right to free exercise of religion under the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-1(a) ("RFRA"). *Id.* at 15-16. Count IV was a request for an injunction prohibiting the Police Department from detailing him to regular assignments for general peace keeping activity outside of abortion clinics. *Id.* at 16.

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[3] Petitioner is entitled to five weeks of vacation annually, four of which he must use in two-week blocks. R. 52, ¶ 95.

The City first brought a motion to dismiss the complaint. R. 9, 10, 11. The court granted the motion with respect to count II, the alleged violation of the Municipal Code, because petitioner had failed to exhaust his administrative remedies. R. 23. The balance of the motion was denied. *Id.* The parties subsequently filed cross-motions for summary judgment. R. 43-46, 52-54, 59-61, 74. During briefing, this Court struck down RFRA as unconstitutional, and the district court then dismissed count III of the complaint. Pet. App. 13a. On August 11, 1997, the district court granted the City's motion for summary judgment and denied petitioner's motion. Pet. App. 18a. The court "conclude[d] that reasonable accommodations were available to [petitioner] that would have eliminated his religious conflict." Pet. App. 16a. On September 21, 1998, the court of appeals affirmed that judgment. Pet. App. 32a.

ARGUMENT

Under Title VII of the Civil Rights Act, an employer must offer a reasonable accommodation of an employee's religious beliefs. See *Trans World Airlines v. Hardison*, 432 U.S. 63, 74 (1977). See also *Ansonia Board of Education v. Philbrook*, 479 U.S. 60, 67 (1986). Here, the City accommodated petitioner's religious objection to providing police service at abortion clinics, since the CBA that governed petitioner's employment contains a number of measures by which petitioner could have avoided assignments to clinics. In fact, petitioner successfully avoided clinic duty after November 19, 1994, by utilizing many of these measures. Petitioner was fully aware prior to November 19, the only occa-

sion on which he was assigned to clinic duty after registering his religious objection, that he had not been granted an exemption from such duty and that he could utilize his contractual rights to avoid future clinic assignments. It is quite settled that an employee's failure to utilize the reasonable accommodations already made available to him ends his case. See *Philbrook*, 479 U.S. at 68-69. That undisputed proposition establishes that the judgment below was correct. Because that judgment does no more than apply settled law, and is consistent with the law in all other circuits, plenary review is not warranted here.

1. "Any reasonable accommodation by the employer is sufficient to meet its accommodation obligation." *Philbrook*, 479 U.S. at 68. Petitioner has never disputed that he knew of the numerous options available to him under the CBA by which he could avoid clinic duty. The CBA provided him the right, for whatever reason he desired, to take days off, obtain special duty assignments, change the hours of his shift, or transfer to a district in which no abortion clinic was located. See R. 52, ¶¶ 83-97. The court of appeals correctly observed: "It is undisputed that, under the terms of the CBA, [petitioner] could transfer to a district comparable to the 14th District but without abortion clinics." Pet. App. 27a. And short of a transfer, petitioner could have elected to work shifts and assignments during which no abortion clinic duty would be necessary. Petitioner's successful use of these measures to avoid clinic duty after his November 19, 1994 clinic assignment illustrates that these measures do in fact provide him with an effective means to avoid the assignment to which he has a religious objection.

Quite settled law makes plain the correctness of the judgment below. Title VII requires an employer to provide only one reasonable option that eliminates any conflict between the employee's religious beliefs and his duties. See, *e.g.*, *Philbrook*, 479 U.S. at 68-69. That accommodation need not be one that the employer prefers. See *id.* at 68-70. Petitioner may have preferred an exemption from clinic duty to the use of his CBA rights, but that does not mean that the City was obligated to provide him with that option.

Petitioner offers only one reason why the CBA did not constitute a reasonable accommodation within the meaning of Title VII. He argues that an employer cannot "satisfy its affirmative obligation to accommodate an employee's beliefs under Title VII by requiring the employee to forfeit *his own* CBA rights." Pet. 8 (emphasis in original). Yet nothing in the opinions below suggests that an employee can be compelled to "forfeit" a contractual right. Petitioner in fact has not been required to "forfeit" any right he has under the CBA. The CBA gives him the right to choose either to stay in the 14th District or to transfer districts. It also gives him the right to change shifts, seek special duty assignments, or take days off to which he is entitled. If he chooses to transfer districts, take particular days off, or seek special assignments for religious or any other reasons, he is not forfeiting any right he has under the CBA, but rather he is exercising such a right. And, as the court of appeals correctly observed, while under the CBA the City cannot require petitioner to transfer to another district, "it does not foreclose the City from offering him a transfer as a reasonable accommodation of his religious beliefs." Pet. App. 31a.

For his part, petitioner does not claim that he will be burdened in any meaningful way if he does in fact exercise his contractual rights in order to resolve the asserted conflict between his job and his religious beliefs. To the contrary, as the district court observed, petitioner "grudgingly concede[d] that he has no specific objection to transferring districts." Pet. App. 15a.[4] Nor has petitioner claimed that transferring shifts, using days off, or taking special duty assignments on occasions on which abortion clinic duty might otherwise be necessary would impose any special hardship or difficulty on him. Petitioner, for example, testified that clinic duty was always on Saturday and that, in the last few years, he had never been denied a requested Saturday off. See R. 52, ¶ 96; *id.* at Exh. J at 91. And as we observe above, petitioner in fact successfully availed himself of various rights under the CBA to avoid clinic duty after his November 19, 1994 assignment.

All other circuits to consider the question have concluded that when an employee can accommodate his religious beliefs by exercising a right to seek job transfers or shift changes, he has received a reasonable accommodation, particularly when these changes do not involve any reduction in pay, benefits, or adversely affect an employee's working conditions. See, *e.g.*, *Cook v. Lindsay Olive Growers*, 911 F.2d 233, 241 (9th Cir. 1990); *Hudson v. Western Airlines, Inc.*, 851 F.2d 261, 266-67 (9th Cir. 1988); *Getz v. Pennsylvania Depart-*

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[4] In fact, at his deposition petitioner testified that for various personal reasons, a transfer to another district "would probably be better for me." R. 52, at Exh. J at 281-82.

ment of Public Welfare, 802 F.2d 72, 73 (3d Cir. 1986); *American Postal Workers Union v. Postmaster General*, 781 F.2d 772 (9th Cir. 1986); *Johnson v. Angelica Uniform Group, Inc.*, 762 F.2d 671, 673 (8th Cir. 1985); *United States v. City of Albuquerque*, 545 F.2d 110, 114 (10th Cir. 1976), cert. denied, 433 U.S. 909 (1977); *Draper v. United States Pipe & Foundry Co.*, 527 F.2d 515, 519-20 (6th Cir. 1975). See also 29 C.F.R. § 1605.2(d)(1)(iii) (1995).[5]

Petitioner claims that the law in the Sixth Circuit is inconsistent with the decision below. See Pet. 9 & n.19. In fact, the two decisions of that circuit on which petitioner relies can readily be harmonized with the holding below. In *Cooper v. Oak Rubber Co.*, 15 F.3d 1375 (6th Cir. 1994), the court observed only that the proffered accommodation would not have been a reasonable one because the employee would have been required to use all of his accrued vacation time. See *id.* at 1379. Here, there were at least two accommodations available to petitioner that would not have required him to use any of his vacation time; even if he opted to use some of his vacation time, there was no need for petitioner to use all or even the majority of his vacation time in order to avoid clinic assignments (which were only on Saturdays); and, indeed there is not even a claim here that an accommodation dependent on the use of some of petitioner's vacation time would have been unreasonable. Moreover, the statement in *Cooper* on which petitioner relies was merely dictum, since the

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[5] Indeed, petitioner acknowledges that the law in many circuits is contrary to his position. See Pet. 9 & n.18.

court went on to hold that the accommodation the employee desired was not "reasonable," and hence was not statutorily required. See *id.* at 1380. In *Smith v. Pyro Mining Co.*, 827 F.2d 1081 (6th Cir. 1987), cert. denied, 485 U.S. 989 (1988), the court held that a CBA term permitting employees to trade days off did not provide a reasonable accommodation because the employee had a religious objection to asking other employees to work on the Sabbath in his stead. See *id.* at 1088. Here, of course, the CBA does not require petitioner to ask anyone to work in his stead. Indeed, the Seventh Circuit distinguished *Smith* in the decision below on just that ground. See Pet. App. 29a.[6]

Accordingly, in the decision below the court of appeals did no more than apply settled law in a manner consistent with the holdings in all other circuits to have reached the question. Petitioner cannot identify any circuit in which an employee's ability to exercise contractual rights is not considered a means by which an employer can discharge its obligation to provide a reasonable accommodation. Nor does he advance any reason of logic or policy why an employer should be precluded from relying on the "accommodations" employees receive through collective bargaining in order to discharge its statutory obligations under Title VII.

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[6] Petitioner also cites *Boomsma v. Greyhound Food Management, Inc.*, 639 F. Supp. 1448 (W.D. Mich. 1986), appeal dismissed, 815 F.2d 76 (6th Cir. 1987), but in that case the employer did not provide any reasonable accommodation until after it had already disciplined the employee for taking time off for religious reasons. See *id.* at 1453-54.

2. Petitioner also argues that the City failed to discharge its obligations under Title VII because he received no response from his district commander to his written request for an exemption from clinic duty. Petitioner notes that "an employer can be found liable under Title VII for rebuffing an employee's request for accommodation and making 'no effort' to provide it." Pet. 15. As the court of appeals correctly observed, however, this principle has no application here.

Petitioner cannot accurately claim that the City made "no effort" to provide him with a reasonable accommodation since the City in fact made such an accommodation to petitioner through collective bargaining with his union:

> [T]he City and the union agreed to provide certain police officers the option to transfer districts for whatever reason without a diminution in their pay or benefits. This understanding was reflected in the CBA, and Officer Rodriguez was aware that the CBA provided him with this option.

Pet. App. 31a. Thus petitioner's claim that no accommodation was made available to him is unsupported by the record.

While petitioner claims that the City should have formally responded to his written request for an exemption from clinic duty, he of course does not dispute that Capt. Guswiler told him that he could obtain no blanket exemption. And petitioner in any event identifies no case in which an employer that had made an accommodation available was nevertheless held liable when, as here, the employee was in fact aware of that

accommodation. Indeed the circuits have consistently held that when an employee is aware that an accommodation is available to him, the employer has no liability for the employee's failure to utilize a reasonable accommodation of which he was aware. See, *e.g.*, *Hudson*, 851 F.2d at 266-67; *Brener v. Diagnostic Center Hospital*, 671 F.2d 141, 146 (5th Cir. 1982); *Redmond v. GAF Corp.*, 574 F.2d 897, 902 & n.12 (7th Cir. 1978); *Chrysler Corp. v. Mann*, 561 F.2d 1282, 1285 (8th Cir. 1977), cert. denied, 434 U.S. 1039 (1978); *City of Albuquerque*, 545 F.2d at 113-14.

By contrast, in each of the cases on which petitioner relies, the employer had made no reasonable accommodation available at the time that an employee was forced to perform duties inconsistent with his religious beliefs. See *Heller v. Ebb Auto Co.*, 8 F.3d 1433, 1440 (9th Cir. 1993); *EEOC v. University of Detroit*, 904 F.2d 331, 334-35 (6th Cir. 1990); *Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481, 1487-89 (10th Cir. 1989), cert. denied, 495 U.S. 948 (1990); *EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1413 (9th Cir. 1989); *EEOC v. Townley Engineering & Manufacturing Co.*, 859 F.2d 610, 615 (9th Cir. 1988), cert. denied, 489 U.S. 1077 (1989); *EEOC v. Ithaca Industries, Inc.*, 849 F.2d 116, 119 (4th Cir. 1988), cert. denied, 488 U.S. 924 (1988); *Burns v. Southern Pacific Transportation Co.*, 589 F.2d 403, 406 (9th Cir. 1978), cert. denied, 439 U.S. 1072 (1979); *Anderson v. General Dynamics*, 589 F.2d 397, 401 (9th Cir. 1978), cert. denied, 432 U.S. 921 (1979). Cf. *Soldinger v. Northwest Airlines, Inc.*, 58 Cal. Rptr. 2d 747, 752-53, 761-66 (Cal. App. 1996) (similar ruling under state statutory counterpart to Title VII). Plainly, then,

these employees could not have been aware of any accommodation to them.

Thus the cases on which petitioner relies stand for no more than the proposition that when the employer has not previously made accommodations available, it must, of course, respond to an employee's request for one. But that was not the case here. Here, petitioner was fully aware of the numerous options available to him under the CBA by which he could reconcile his job with his religious beliefs. As the court of appeals noted, without contradiction from the petitioner, "it is undisputed that as a 16-year veteran of the police force, [petitioner] was aware of the options available to him under the union contract that could accommodate his religious conflict." Pet. App. 16a. While petitioner correctly observes that an employer must offer some accommodation on request, at least if it can be provided without undue hardship, nothing in the decision below is inconsistent with an employer's statutory duty to ensure that an employee is aware of any accommodation that it can reasonably make available to him. Indeed, the court of appeals expressly acknowledged that statutory obligation. See Pet. App. 31a. That court held only that when the employee is already aware of a means that is contractually available to him by which he can obtain a reasonable accommodation of his religious beliefs, the employer cannot be held liable merely because it has failed expressly to reject the employee's request for additional accommodation before the employee is called upon either to exercise his contractual rights or perform duties to which he has a religious objection. This is the only result consistent with this Court's holding in *Philbrook* that as long as an employer makes at least one

reasonable accommodation available to the employee, even if the employee seeks some other accommodation, "the statutory inquiry is at an end." 479 U.S. at 68. Here, petitioner was aware that the City, through the CBA, had made available an accommodation which would have eliminated the conflict between petitioner's religious beliefs and his official duties. Accordingly, since the accommodation was undisputedly available to petitioner, the City discharged its statutory obligations.

Not only has petitioner failed to establish that his claim would have succeeded in any other circuit, but he can adduce no justification in logic or policy for the rule he advocates, which would create a new obligation requiring an employer to remind its employees of those available accommodations of which they are already aware. Surely the facts of this case do not argue for such a rule. Petitioner knew of several accommodations available by contract that would have obviated the need for him to perform duties to which he had a religious objection. He also knew that his watch commander had not granted him the blanket exemption from clinic duty that he had requested. Plainly, then, it was up to petitioner to utilize the available and reasonable accommodation. As we explain above, there is little point in holding the City liable for failing to tell an employee about options of which he is already fully aware that will accommodate his religious beliefs.

Nor does petitioner explain why the court of appeals' holding on this point involves a recurring question of sufficient import to merit plenary review. Surely most employees will utilize those reasonable accommodations available to them under a CBA and of which they are

aware, instead of suing merely because the employer does not remind them of their contractual rights. Indeed petitioner cannot identify even a single case other than this one in which an employee predicated a Title VII claim on his own failure to utilize an accommodation to which he was contractually entitled and of which he was aware, merely because the employer failed to remind the employee of his contractual entitlement.[7] Accordingly, there is no basis for concluding that the issue identified by petitioner merits this Court's plenary review.

3. Petitioner's approach is flawed in another respect as well. An employer is never required to provide an accommodation that would cause it undue hardship. See *Hardison*, 432 U.S. at 84. An "undue hardship" is caused by any accommodation that requires the employer to bear more than de minimis costs. See *id.* And the "costs" relevant to this calculus include not just actual expenditures, but also "lost efficiency" and the costs associated with creating accommodations that treat employees unequally on the basis of their religious beliefs. See *id.* at 80-81, 84. Here, because the accommodation petitioner seeks would impose more than de minimis costs, it is not "reasonable" within the meaning of Title VII. Accordingly it would not be statutorily required regardless of the correctness of the holding below on the CBA.

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[7] Petitioner seems to suggest that *EEOC v. Hacienda Hotel* is such a case. See Pet. 15-16 & n.44. In fact, in that case liability was predicated on the court's conclusion that the applicable CBA offered employees no reasonable accommodation of their religious beliefs. See 881 F.2d at 1513.

The record in fact makes perfectly clear that the accommodation petitioner seeks—an exemption from all assignments at abortion clinics except in circumstances that petitioner judges to be exigent—would impose significant costs on the Chicago Police Department. That is because the accommodation must naturally be offered not only to petitioner, but to any other police officer who voices a religious objection to a particular assignment. The Chicago Police Department comprises more than 13,000 sworn members. R. 52 at Exh. C, ¶ 12. Permitting all officers to decline particular assignments for religious reasons absent exigent circumstances in a police department of this size and complexity poses quite significant problems.

In Chicago, because of the high volume of calls received by the police dispatching system, radio air-time must be kept to a minimum. R. 52, ¶ 73. In fact, the Police Department considers conserving radio air-time to be a critical safety issue. R. 60, ¶ 181. In making assignments, dispatchers know only which cars are available. R. 52, ¶ 67. They have no way of knowing who is in those cars or whether those officers have some personal objection to responding to certain assignments. *Id.* ¶¶ 67-68, 70. Thus, an officer's refusal of an assignment based on religious beliefs would tie up air-time, delay response to the call to which the officer was refusing to respond, and delay response to all other calls. R. 60, ¶ 184.

Petitioner's proposed accommodation causes undue hardship for the additional reason that it would undermine the Police Department's command structure. Petitioner is willing to respond to emergencies at clinics,

but he could not define what constitutes an emergency. R. 52, ¶¶ 48-50; R. 52 at Exh. J at 127-51, 173-96. Apparently, as part of petitioner's "accommodation," the Department would have to let him define what constitutes an emergency assignment. This is an undue hardship; it interferes with the Department's ability to run a paramilitary organization in an orderly manner by subjecting to dispute a superior's determination of when the need for his assistance at an abortion clinic is sufficiently pressing to overcome a religious objection. And, again, precious radio time would be consumed as officers and supervisors confer on whether a particular assignment is sufficiently urgent that an officer's religious objection can be overcome.[8]

Neither of the questions presented in the petition for certiorari even places at issue the question whether the only accommodation petitioner has ever identified in this litigation as satisfactory to him is in fact a reasonable accommodation within the meaning of Title VII. For that reason, even if the Court grants petitioner plenary review, it may well conclude that the questions he has presented are not appropriately reached, since the judgment can be affirmed on other, quite fact-specific grounds. For that reason as well, plenary review is not warranted.

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[8] Petitioner also does not address Chief Judge Posner's view that Title VII simply does not require a law enforcement agency to accommodate an employee who is unwilling to live up to his obligation to enforce the law impartially regardless of his own beliefs. See Pet. App. 32a-36a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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